Filed 2/17/09 Calemine v. Jared Court Homeowenrs Assn. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

LARRY CALEMINE et al., Plaintiffs and Appellants, v. JARED COURT HOMEOWNERS ASSOCIATION, INC., Defendant and Respondent.	B200299 (Los Angeles County Super. Ct. No. LC072262)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stanley Martin Weisberg, Judge. Affirmed.

Law Offices of J.R. Seashore, J.R. Seashore; Esner, Chang & Ellis, Stuart B. Esner, Holly N. Boyer and Andrew N. Chang for Plaintiffs and Appellants.

Procter, Slaughter & Reagan, Barry J. Reagan and Gabriele M. Lashly for Defendant and Respondent.

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Plaintiffs and appellants Larry and Camille Calemine appeal from a judgment entered in favor of defendant and respondent the Jared Court Homeowners Association, Inc. (HOA) following a bench trial on appellants' seeking to compel the HOA to make repairs to the common area so as to prevent water intrusion and flooding into the lower level of appellants' condominium. Applying the rule of judicial deference articulated in *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249 (*Lamden*), the trial court ruled that appellants failed to meet their burden to establish any right to enjoin the reasonable and good faith decision made by the HOA Board of Directors (HOA board) regarding further water intrusion repairs. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

History of Water Intrusion at Jared Court.

The Jared Court condominium development (Jared Court) is located on Victory Boulevard in Woodland Hills. Jared Court is comprised of eighteen units in four buildings and includes common area developments comprised of a tennis court, swimming pool, concrete walkways and front patios, and mature landscaping. Each unit has a similar three-level, townhouse design. The lowest level is comprised of a garage and windowless "bonus room" adjacent to the garage; the middle level contains an entry foyer, living room, family and dining room, kitchen and powder room; and the upper level has three bedrooms and two bathrooms.

A document entitled "Enabling Declaration Establishing the Plan for Condominium Ownership" (enabling declaration) recorded in Los Angeles County on January 22, 1982, as document 82-76032, established the HOA, responsible for maintaining the Jared Court buildings and grounds in the most cost-effective manner possible. The HOA is governed by written articles of incorporation, bylaws and covenants, conditions and restrictions (CC&R's). Those documents provide the HOA with the duty to maintain, operate and manage the common areas; the CC&R's expressly require the HOA board to "maintain the portion of the project not occupied by the units, in good, clean, attractive and sanitary order and repair."

Shortly after the completion of construction of Jared Court in 1982, occupants observed water intrusion through the foundation. The HOA filed a construction defect lawsuit against the developer, which then settled in favor of the HOA for $335,000. Using the settlement funds, the HOA retained Westar Flooring (Westar) to repair and waterproof the interior of the below-grade surfaces of the Jared Court garages and bonus rooms. These repairs were also defective, and the HOA sued Westar in 1996 (Westar lawsuit), ultimately settling the matter for $565,000.

During the Westar lawsuit, the HOA board retained Robert H. Jacobs & Associates (Jacobs) as a consultant. Jacobs opined that the exterior repairs necessary to resolve the water intrusion problem would cost $1,020,896.72 and involve extensive trenching and disruption to common areas. After the Westar lawsuit settled, the HOA board received repair estimates for less extensive work from Construction Headquarters, Inc. (CHI) ranging from $305,000 to $119,800. The HOA board decided to retain CHI to perform repairs and utilized the balance of the Westar lawsuit settlement for other common area repairs and improvements unrelated to water intrusion.

CHI completed its work in 1998 and wrote to confirm several discussions with HOA board members in which it indicated "we can take no responsibility nor give any guarantees whatsoever, that the water penetration issues, through the retaining walls, will be controlled or corrected, due to the existing hydrostatic pressures, capillary action from ground water intrusion or any other issues relating to dampness, as we are not addressing these issues in the garage/storage context." Jared Court did not experience any water intrusion problems between the time the CHI repairs were completed and late 2004 to early 2005.

Appellants' Condominium Purchase.

Appellants purchased unit five in building two at Jared Court (condominium) from Walter Samuelson (Samuelson) in July 2002. The condominium is an end unit, and the front and left side face an upward slope which is supported by a retaining wall that constitutes the base of the front and side walls of the building itself. Appellants used the lower level bonus room as an office. In January 2005, approximately three years after

appellants moved in and during a period of excessively high rainfall, the garage and bonus room area of the condominium suffered water intrusion. There was standing water in the bonus room and water which flowed through the slightly slanted garage floor. The same areas experienced water intrusion to a lesser extent in April 2005 and April 2006. Ultimately, according to appellants, the water intrusion rendered the bonus room unusable due to moisture, concerns regarding mold infestation and the threat of further water intrusion. An industrial hygienist who examined the condominium found evidence of certain types of fungi and spores in the garage and bonus room areas.

Appellants' insurance company rejected their claim on the ground that the cause of the damage originated from the condominium's common area, which was not covered by the policy. Beginning in January 2005, appellants made efforts to have the HOA and the management company for Jared Court address the water intrusion problem. At that point, appellants first learned of the history of water intrusion problems at Jared Court.

In February 2005, the HOA board sent a memo to all HOA members regarding water intrusion, and thereafter in June 2005 provided a more thorough letter both to HOA members and prospective Jared Court homeowners. The initial memo briefly summarized prior water intrusion issues at Jared Court and indicated that while efforts would be made to address roof and foundational leaks, "the HOA can not prevent all leaks" and would investigate and make certain repairs. The subsequent letter more elaborately outlined the history of the Jared Court water intrusion problem and then discussed the extent and the cost of the work that would be required to eradicate the problem, noting that such work could not guarantee there would be no further water intrusion in times of heavy rain and indicating that the work would have to be paid "through a substantial special assessment levied against each of the unit owners. . . ." Given this, the HOA board further wrote it had "determined that it is appropriate and in the best interests of the Association to assert the position that it is not and will not be responsible for any water intrusion into the below grade portions of the units at the base of the masonry block walls or through the concrete floor slab of the garage and bonus rooms. Similarly, the Association will not be responsible for or pay to repair or abate

damage to construction materials or personal property in these areas resulting from such water intrusion. The Association does not intend at this time to investigate the precise point of entry of water relative to the reported losses unless it is presented with competent evidence that the prior work was done improperly or that the intrusion presents a threat to the structural integrity of the buildings. Mitigation against further water damage to construction materials and property shall be the responsibility of the owner."

James Huber (Huber), president of the HOA and a Jared Court resident since 1982, explained that in reaching the decision not to undertake additional repairs, the HOA board consulted with and acted upon the advice of attorney Robert Hilshafer (Hilshafer). It also consulted with the contractor who performed the repair work in 1998. It further considered that the cost of the work would need to be paid through a special assessment and determined the assessment would be a hardship to many of the Jared Court homeowners who were retirees on a fixed income. In determining not to perform further repairs the HOA board also weighed the facts that prior repairs had not been completely successful, contractors would not offer a guarantee of future success and the water intrusion occurred into a limited, non-habitable area of the units.

In or about August 2005, the HOA paid $10,000 to Cindy Williams, another Jared Court homeowner, after her unit suffered water intrusion and mold. The payment resulted from a claim she made against the HOA for damage to her personal property. At least one other Jared Court homeowner, however, had paid for repairs to his own unit after it suffered damage from water intrusion.

The Pleadings and Trial.

Appellants filed their complaint in August 2005 against the HOA, Samuelson and others, alleging causes of action for nuisance, breach of contract, negligence and misrepresentation/concealment. The nuisance cause of action alleged that the HOA maintained and repaired the premises in such a manner so as to permit moisture to collect in common areas, resulting in damage to the walls and floors of the condominium and constituting a nuisance within the meaning of Civil Code section 3479. In connection with the second and third causes of action, appellants alleged that the HOA breached its

duty to maintain and repair the common areas by, among other things, "allow[ing] continuing damage to occur as a result of past negligent decisions in making repairs, hiring repairers, obtaining the necessary monies to make proper repairs." The HOA answered, generally denying the allegations and asserting multiple affirmative defenses.

In October 2006, appellants filed a first amended complaint which added causes of action for injunctive and declaratory relief. They premised their new claims on the HOA's alleged breach of duty to maintain the common areas in good repair as outlined in the enabling declaration. Appellants sought "a permanent, mandatory injunction directing defendant to effect immediate, effective and permanent repair to the common area adjacent to and surrounding plaintiffs' unit so as to permanently prevent future water intrusion into plaintiffs' unit and resulting damage therefrom, and enjoining defendant from continuing to violate the mandatory provisions of the Declaration requiring them to effect such repairs." In a subsequent answer filed in October 2006, the HOA denied the allegations and raised many affirmative defenses.

During discovery, testing conducted by experts revealed that the initial Jared Court construction was defective, as a below-grade drain was installed upside down and at the wrong depth. When soil outside building two would become overly-saturated with water, the defects permitted water to seep under the retaining walls and concrete slab into the garage and bonus room area. The work required to fix this problem for building two involved trenching outside to a depth of 10 to 11 feet and a width of three feet, and installing subsurface drains and waterproofing material on the retaining walls outside below grade surfaces. This was characterized as major work that would involve the removal of landscape and hardscape, and take approximately six months to complete. Estimates for the cost of this work ranged from $270,000 to $429,000 without any guarantee that further water intrusion would be prevented. One expert, however, opined that these repairs would resolve the water intrusion problem. Estimates for the additional cost to repair the interior of appellants' condominium ranged from $33,000 to $45,000.

Following the dismissal of certain defendants and Samuelson obtaining summary judgment, a bench trial commenced against the HOA alone in January 2007.[1] The parties each called experts to testify regarding the scope and cost of the repair work necessary to remediate the water intrusion problem and experts to opine as to whether the HOA board had acted reasonably in determining not to undertake additional repairs.

At the conclusion of trial, the court took the matter under submission. It issued a 13-page tentative decision on March 13, 2007. Thereafter, at appellants' request, it issued a statement of decision on May 2, 2007. The trial court ruled that because appellants failed to offer evidence of damages, they could not meet their burden of proof on their tort claims. The trial court further ruled that appellants failed to meet their burden to show they were entitled to injunctive relief. It relied on the principles outlined in *Lamden, supra,* 21 Cal.4th 249 in stating that "[d]eference to the decisions of the HOA board is appropriate so long as the board has acted reasonably and in good faith to carry out its responsibilities under the governing documents and the controlling statutory framework." The trial court rejected appellants' argument that *Lamden* was inapplicable because the HOA board's conduct consisted of inaction rather than action, finding "[p]laintiffs came into [the] game late, but the history of prior repairs demonstrates that the HOA seriously, thoroughly and reasonably addressed the issue with a sincere desire to solve the problem." It determined that the decision whether to provide any additional waterproofing to the condominium was a decision best left to the sound discretion of the HOA board. Judgment was entered the same day and this appeal followed.

DISCUSSION

Appellants contend that the trial court improperly applied *Lamden* to accord deference to the HOA board's decision to require individual homeowners to remediate further water intrusion problems. Preliminarily, they argue that the rule outlined in

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[1] Appellants have separately appealed the grant of summary judgment, *Larry Calemine et al. v. Walter Samuelson et al.*, case No. B194461.

Lamden was inapplicable to the HOA's decision because that decision represented inaction rather than action. Further, they contend that even if *Lamden* applied, the trial court should have issued an injunction requiring the HOA board to undertake some type of action to alleviate further water intrusion as part of its duty to maintain the Jared Court common areas. We find no merit to these contentions. The trial court properly applied *Lamden* in declining to disturb the reasonable and good faith decision of the HOA board to require homeowners to bear responsibility for further water intrusion repairs.

I. Standard of Review.

The question of whether to apply a rule of judicial deference to the HOA board's decision is a mixed question of fact and law. "In deciding a mixed question, the trial court must: (1) establish the historical facts; (2) select the applicable law; and (3) apply the law to the facts." (*CUNA Mutual Life Ins. Co. v. Los Angeles County Metropolitan Transportation Authority* (2003) 108 Cal.App.4th 382, 391.) While we review the trial court's factual findings using the substantial evidence standard of review, we review the application of the facts found by the trial court and supported by substantial evidence to the law de novo. (*Ibid.*; accord, *In re Collins* (2001) 86 Cal.App.4th 1176, 1181 ["This court applies the substantial evidence test to the trial court's resolution of pure questions of fact and independently reviews questions of law, such as the selection of the controlling rule"].) Thus, we review the trial court's findings regarding the HOA board's decision-making process for substantial evidence and independently review the trial court's decision to apply the *Lamden* rule of judicial deference on the basis of those findings.

II. The *Lamden* Rule of Judicial Deference.

By statute, a homeowners association "is responsible for repairing, replacing, or maintaining the common areas, other than exclusive use common areas, and the owner of each separate interest is responsible for maintaining that separate interest and any exclusive use common area appurtenant to the separate interest." (Civ. Code, § 1364, subd. (a).) Here, the enabling declaration and the bylaws also impose that duty on the HOA, charging it with "the duty of maintaining, operating and managing the Common

Area of the Project" and requiring it to "[c]ause the common area to be maintained." In *Lamden, supra*, 21 Cal.4th 249, the Supreme Court resolved the previously unanswered question of how to evaluate a homeowners association's maintenance decisions: "The precise question presented, then, is whether we should in this case adopt for California courts a rule—analogous perhaps to the business judgment rule—of judicial deference to community association board decisionmaking that would apply, regardless of an association's corporate status, when owners in common interest developments seek to litigate ordinary maintenance decisions entrusted to the discretion of their associations' boards of directors." (*Id.* at p. 260.)

In *Lamden*, the plaintiff was a condominium owner who sued her homeowners association when the association decided to "spot treat" rather than fumigate a termite infestation in the building containing the plaintiff's unit. The evidence presented during a bench trial showed that on several occasions between the late 1980's and early 1990's the association elected to spot treat termite problems in the interior and exterior of the plaintiff's building. On one of those occasions, the plaintiff and the association each obtained termite inspection reports which recommended fumigation rather than spot treatment. The association rejected fumigation on the basis of several factors, including the cost of fumigation, logistical problems with having to relocate residents and their pets, health and safety concerns about fumigation residue and the likelihood that the termite problem would recur even with fumigation. (*Lamden, supra*, 21 Cal.4th at pp. 253–254.)

The plaintiff in *Lamden* sued, initially alleging several causes of action but ultimately seeking only an injunction and declaratory relief. Applying "what it called a 'business judgment test,'" the trial court ruled in favor of the association and determined that while the association could have handled the matter differently, the association had a plan and "'a rational basis for their decision to reject fumigation, and do . . . what they did.'" (*Lamden, supra*, 21 Cal.4th at p. 256.) The court of appeal reversed on the ground that the trial court should have applied an objective standard of reasonableness to the association's decisions and likely would have reached a different result if it had. (*Ibid.*)

Resolving the standard for judicial review of discretionary economic decisions made by the governing boards of community associations, the *Lamden* court held: "[W]here a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise." (*Lamden, supra,* 21 Cal.4th at pp. 264, 265; see also *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 374 ["Generally, courts will uphold decisions made by the governing board of an owners association so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy"].) Applying this rule of deference to the association's decision to spot treat termite infested areas of the development, the *Lamden* court further held that neither Civil Code section 1364 nor the CC&R's could reasonably be construed to require that the association undertake any particular method of termite treatment or that it keep the development termite free. (*Lamden, supra,* at p. 270.) Emphasizing the practical impact of its decision, the court stated that "[c]ommon sense suggests that judicial deference in such cases as this is appropriate, in view of the relative competence, over that of courts, possessed by owners and directors of common interest developments to make the detailed and peculiar economic decisions necessary in the maintenance of those developments. A deferential standard will, by minimizing the likelihood of unproductive litigation over their governing associations' discretionary economic decisions, foster stability, certainty and predictability in the governance and management of common interest developments." (*Id.* at pp. 270–271.)

III. The Trial Court Properly Applied *Lamden*.

In its statement of decision, the trial court ruled that *Lamden* applied, as the evidence showed the HOA board acted reasonably and in good faith in its efforts during many years to address the water intrusion problem. Commenting that it was "impressed

with the thoroughness of the prior work performed by the board in attempting to fix the water intrusion problems," the court outlined the basis for its determination to accord deference to the HOA board: "The members of the board appeared sincerely interested in the well-being of the HOA membership as a whole and seriously grappled with their decision. The decision here is not an easy one. The board recognized, as does the court, the discomfort, health concerns and potential financial consequences motivating plaintiffs. The board balanced those factors against the following: 1) the high cost of the work, 2) the inconvenience to all homeowners created by the six months of construction adjacent to their units, 3) the removal and replacement of the hardscape and landscape, 4) the fact that the water intrusion into plaintiffs' unit was confined to the non-habitable garage/bonus room area, 5) the water intrusion problem had been greatly minimized by previous repairs and only reappeared when the ground was fully saturated with water from near-record rainfall, 6) the water intrusion at issue is not endangering the structural integrity of the building, and 7) there is no documentation of the presence of hazardous mold. The board also relied on the advice of their counsel."

We see no basis to disturb the trial court's conclusion. The trial court properly rejected appellants' argument that *Lamden* did not apply to the HOA board's decision to take no further action. Appellants contend that *Lamden* applies only to decisions involving a selection among maintenance options—not to decisions resulting in the performance of no remedial work. But their argument hinges on their narrow characterization of the HOA board's decision as involving solely inaction. As the trial court recognized, the HOA board addressed the water intrusion problem over many years, filing two lawsuits and executing two sets of repairs; the second repairs resolved the water intrusion problem for several years until a year of record rainfall. The decision not to perform additional major repair work in the face of these prior repair efforts was not inaction, but rather, one in a series of maintenance decisions entitled to deference. That the decision resulted in no further repairs did not remove it from the scope of the business judgment rule. (See *Finley v. Superior Court* (2000) 80 Cal.App.4th 1152, 1162 [decision by homeowners associations not to pursue litigation to challenge contributions

made in support of a ballot measure protected by the business judgment rule]; cf. *Lamden, supra*, 21 Cal.4th at p. 270 [observing that nothing in the homeowners association's governing documents "require that the Association render the Development constantly or absolutely termite-free"].)

A case cited by appellants, *James F. O'Toole Co., Inc. v. Los Angeles Kingsbury Court Owners Assn.* (2005) 126 Cal.App.4th 549, is instructive, as it illustrates the type of decision which is not subject to the business judgment rule. There, a homeowners association urged that it made a "business decision" in determining not to levy a special assessment to satisfy a civil judgment against it. Finding the decision was not entitled to deference, the court stated: "Generously construed, the Association's refusal to levy a special emergency assessment is a simple refusal to pay a final judgment long since due. While that refusal may in some sense constitute a 'business decision,' it is not one to which a court must defer by refusing to enforce a valid judgment." (*Id*. at p. 560.) Thus, while a decision plainly contrary to law is not entitled to deference, decisions regarding the maintenance, control and management of a condominium development's common areas are subject to deference under *Lamden.* For example, in *Harvey v. The Landing Homeowners Assn.* (2008) 162 Cal.App.4th 809, the court applied the business judgment rule to evaluate a homeowners association's decision to permit certain homeowners the right to use up to an amount of inaccessible attic space for storage. Outlining the evidence which showed that the board conducted an investigation regarding homeowners' use of the space, obtained input from current homeowners, ensured compliance with city building codes and consulted the development's insurance broker, the court determined that "the Board, 'upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members,' properly exercised its discretion within the scope of the CC&R's when it determined the fourth floor homeowners could use exclusively up to 120 square feet of inaccessible attic space common area as rough storage." (*Id*. at p. 822, fn. omitted.)

Similarly, here, the decision regarding what, if any, further repairs to perform to one building within a condominium development was a decision squarely covered by

Lamden. Moreover, like *Lamden*, the evidence showed that the HOA board reasonably and in good faith exercised its discretion to determine that further repairs were not in the best interest of all homeowners. As the trial court pointed out, the HOA board considered a number of factors, including the cost of the work, the impact to all homeowners created by six months of major construction involving the removal of hardscape and landscape, the fact that the water intrusion did not occur in habitable areas of the condominium, the effect of prior repairs which eliminated water intrusion except in the event of record rainfall and the fact that the water intrusion had neither imperiled the structural integrity of the building nor caused hazardous mold. These factors are akin to those considered by the association in *Lamden*, which included the cost of fumigation, the impact of the fumigation work on residents and the uncertainty that fumigation would resolve the termite problem. (*Lamden, supra,* 21 Cal.4th at p. 254.) Thus, on the basis of the evidence presented concerning the HOA board's decision-making process, the business judgment rule applies to "'insulate[] from court intervention those management decisions which are made by directors in good faith in what the directors believe is the organization's best interest.' [Citations.]" (*Id.* at p. 257.)

We are unpersuaded that a different conclusion is warranted on the basis of appellants' remaining challenges to the application of *Lamden.* Appellants point out that their experts outlined other options available to address the water intrusion problem that were less intrusive and less costly than the major repairs the HOA board rejected. But the purpose of the business judgment rule is to address situations "where 'the challenged action was, in essence, a business judgment, i.e., a choice between competing and equally valid economic options' . . . ." (*Lamden, supra,* 21 Cal.4th at p. 266, fn. 8; see also *Eldridge v. Tymshare, Inc.* (1986) 186 Cal.App.3d 767, 776 [business judgment rule "sets up a presumption that directors' decisions are based on sound business judgment. This presumption can be rebutted only by a factual showing of fraud, bad faith or gross overreaching"].) Because the evidence demonstrated that the HOA board's decision to perform no further remedial work was made reasonably and in good faith, the HOA board's rejection of more than one option remained a business judgment. According to

Huber's testimony, less intrusive alternatives were rejected on the ground that there was no degree of certainty they would be effective. Moreover, appellants themselves expressly rejected the least costly repair—the installation of a sump pump inside their condominium—stating they would only accept a repair that prevented the water intrusion as opposed to one that merely ameliorated it.

Finally, evidence that the HOA made a $10,000 payment to Williams after her unit suffered water intrusion is of no consequence. The payment settled a claim she made against the HOA for damage to her personal property that resulted from water intrusion. Appellants were not seeking any reimbursement for damage to personal property, but rather, only structural repairs to their condominium.

Our Supreme Court has "emphasized that 'anyone who buys a unit in a common interest development with knowledge of its owners association's discretionary power accepts "the risk that the power may be used in a way that benefits the community but harms the individual."' [Citations.]" (*Lamden, supra,* 21 Cal.4th at pp. 269–270.) Here, as the trial court recognized, the HOA board considered the interests of the HOA membership as a whole, and its determination to impose the expense of additional waterproofing measures on individual homeowners rather than the entire membership was a discretionary decision entitled to deference. The trial court properly ruled that appellants were not entitled to injunctive relief.

DISPOSITION

The judgment is affirmed. Respondent is entitled to its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST